In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 549

DANDY PRODUCTS, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-20) is reported at 332 F. 2d 985. The Commission's decision and order (Pet. App. 15-16) and the Initial Decision of the Hearing Examiner (Pet. App. 1-14) are unreported.

JURISDICTION

The final decree of the court of appeals (Pet. App. 22-23) was entered on July 10, 1964. The petition

for a writ of certiorari was filed on October 1, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners Dandy Products, Inc. ("Dandy") and its president, Gron, committed unfair acts and practices, in violation of Section 5 of the Federal Trade Commission Act, by using games of chance to sell merchandise.

2. Whether the Commission properly entered a cease-and-desist order against petitioner Gron individually as well as in his capacity as president of Dandy.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, provides in pertinent part:

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
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> * * * *
>
> (a)(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

The Federal Trade Commission charged Dandy Products, Inc. ("Dandy"), Joseph M. Gron, the pres-

ident of Dandy and a partner in Capitol Mailers ("Capitol"), and Ferrari (Gron's partner in Capitol), with unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. The complaint alleged that they had used lottery schemes or games of chance in the sale and distribution of merchandise (Pet. App. 1).

The Commission (Pet. App. 15-16) adopted the hearing examiner's findings of fact, conclusions and order (Pet. App. 1-14). The findings, which are not here challenged, establish the following facts: Dandy is engaged in the public sale and distribution in interstate commerce of radios, watches, electrical appliances and other articles; Gron, its president, "formulates, directs and controls the acts and practices of" Dandy (Pet. App. 2-3). Dandy and Gron furnished members of the public the equipment for operating various plans of merchandising involving the use of games of chance or lottery schemes. A typical example of Dandy's business activities, described at Pet. App. 4-7, was the distribution of punch boards or push cards, and related circulars and materials, pursuant to which merchandise was offered as premiums or prizes to other members of the public who purchased "pushes" or chances on the cards. The value of the article far exceeded the amount paid for the punch or push, and the element of chance alone determined whether the purchaser received any merchandise and how much he paid for the punch or push (Pet. App. 7, 12-13). The mailing of the push cards and related materials was handled for Dandy by Capitol Mailers,

a firm which also provided mailing services to more than 100 other clients (Pet. App. 3-4).

The Commission concluded that in selling and distributing merchandise by these means Dandy and Gron committed unfair trade practices in violation of Section 5 of the Federal Trade Commission Act. It cited "an unbroken line of decisions" holding that the distribution of merchandise through games of chance violated Section 5, and rejected the contention that the public policy which underlay these decisions had changed (Pet. App. 8-9, 13.) It ordered Dandy, Gron individually and as an officer of Dandy, and their employees and agents, to cease and desist from selling or disposing of merchandise by use of games of chance, and from supplying or shipping push cards or other lottery devices to be used in such sale or disposal of merchandise (Pet. App. 13-14).

As to Capitol Mailers, the Commission held that it performed only a routine mailing service under Dandy's instructions similar to that which it provided for many other clients, did not handle Dandy's merchandise and did not manufacture the push cards. The Commission concluded that relief against Gron and Ferrari, as copartners of Capitol, was not warranted (Pet. App. 10-11), and dismissed the complaint as to Ferrari (Pet. App. 14). The Commission noted that since the cease-and-desist order applied to Gron individually, it would also prevent him from continuing the illegal practices by his activities as a partner in Capitol or in any other capacity (Pet. App. 12).

The Court of Appeals for the Seventh Circuit up-

held the Commission's order (Pet. App. 17-20), rejecting the petitioners' contention that because of "a change in the 'moral' climate of the business community" their practices should no longer be deemed "unfair."

ARGUMENT

1. In *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, this Court held that the use of a punch board or other lottery scheme or game of chance in the sale of merchandise was against public policy and was an "unfair method of competition" in violation of Section 5 of the Federal Trade Commission Act.[1] Since that time various courts of appeals have upheld Commission orders directed against the sale or distribution of merchandise through punch boards, push cards and similar games of chance, and

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[1] The Court stated [291 U.S. at 313]:

> "It employs a device whereby the amount of the return they [purchasers] receive from the expenditure of money is made to depend upon chance. Such devices have met with condemnation throughout the community. Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy. For these reasons a large share of the industry holds out against the device, despite ensuing loss in trade, or bows reluctantly to what it brands unscrupulous. It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not 'unfair.'"

this Court several times has declined to review those decisions.[2]

Petitioners urge (Pet. 13-18) that *Keppel* should be reconsidered, on the ground that "our society has changed radically" since the case was decided in 1934, and that today the sale of goods through games of chance no longer contravenes public policy. But whatever changes there may have been during the past 30 years in the public attitude toward gambling as a form of recreation, there is no indication that public condemnation of the use of gambling devices as a method of selling merchandise is any less severe today than when *Keppel* was decided. The numerous courts of appeals' decisions that have condemned such schemes (see note 2, *supra*) cover substantially the entire period between the decision in *Keppel* and the present time, and there is no need to reexamine this settled authority.[3]

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[2] *E.g.: Wren Sales Co.* v. *Federal Trade Commission*, 296 F. 2d 456 (C.A. 7, 1961); *Goldberg* v. *Federal Trade Commission*, 283 F. 2d 299 (C.A. 7, 1960); *Peerless Products, Inc.* v. *Federal Trade Commission*, 284 F. 2d 825 (C.A. 7, 1960), certiorari denied, 365 U.S. 844; *Lichtenstein* v. *Federal Trade Commission*, 194 F. 2d 607 (C.A. 9, 1952), certiorari denied, 344 U.S. 819; *Modernistic Candies, Inc.* v. *Federal Trade Commission*, 145 F. 2d 454 (C.A. 7, 1944); *Helen Ardelle, Inc.* v. *Federal Trade Commission*, 101 F. 2d 718 (C.A. 9, 1939); *Federal Trade Commission* v. *F. A. Martoccio Co.*, 87 F. 2d 561 (C.A. 8, 1937); *Rosten* v. *Federal Trade Commission*, 263 F. 2d 620 (C.A. 2, 1959); *Drath* v. *Federal Trade Commission*, 239 F. 2d 452 (C.A.D.C., 1956), certiorari denied, 353 U.S. 917; *Gay Games, Inc.* v. *Federal Trade Commission*, 204 F. 2d 197 (C.A. 10, 1953).

[3] In addition to the present case (Pet. App. 18-19), the court below thrice has rejected the argument that a change

Petitioners also argue (Pet. 8-11) that *Keppel* was decided under the original wording of Section 5, which prohibited only "unfair methods of competition"; that the Wheeler-Lea amendments of 1938 broadened Section 5 to prohibit "unfair or deceptive acts or practices"; and that because the latter provision, which is involved in the present case, does not define "unfair * * * practices," the Commission cannot determine that a particular practice is "unfair" without receiving evidence of its impact upon consumers. We submit, however, that *Keppel* establishes the illegality of petitioner's activities as "unfair * * * acts or practices" as well as an "unfair method of competition." The basic rationale of *Keppel* was that a device "whereby the amount of the return [purchasers] receive from the expenditure of money is made to depend upon chance" is "unfair" because it "is of the sort which the common law and criminal statutes have long deemed contrary to public policy" (291 U.S. at 313). This reasoning is equally applicable when the use of games of chance to sell merchandise is challenged as an unfair act or practice rather than as an unfair method of competition. The legislative history of the Wheeler-Lea amendments shows that they were designed to overturn this Court's holding in *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 646-

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in business practices warranted reexamination of the underlying premise in *Keppel* that the use of games of chance to sell merchandise is contrary to public policy. *Wren Sales Co.* v. *Federal Trade Commission*, 296 F. 2d 456 (1961); *Peerless Products, Inc.* v. *Federal Trade Commission*, 284 F. 2d 825 (1960), certiorari denied, 365 U.S. 844; *Modernistic Candies, Inc.* v. *Federal Trade Commission*, 145 F. 2d 454 (1944).

647, that the Commission was required to prove injury to competition in order to establish a violation of Section 5.[4] They were not intended, however, to overturn the ruling in *Keppel* that the use of lottery schemes in the sale of merchandise is unfair.

2. Upon finding that Gron had violated the Act, the Commission was justified in entering a cease-and-desist order against him not only as an officer of Dandy but also individually. Petitioners contend (Pet. 18-19) that since Gron's unlawful acts were done only in connection with Dandy's operations, the order against him should be similarly limited and should not cover his activities as a partner in Capitol Mailers. The short answer is that since Gron, as the president of Dandy, "formulates, directs and controls [Dandy's] acts and practices" (Pet. App. 2), the Commission was justified in concluding that he should be enjoined from engaging in such practices in any capacity, in order to insure that the order will be "fully effective in preventing the unfair * * * practices which the Commission had found to exist." *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 119-120; *Surf Sales Co.* v. *Federal Trade Commission*, 259 F. 2d 744 (C.A. 7); cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473.

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[4] 83 Cong. Rec. 391, 395-397, 3255. See, also, the discussion of the legislative history in *Lichtenstein* v. *Federal Trade Commission*, 194 F. 2d 607, 609-610 (C.A. 9), certiorari denied, 344 U.S. 813.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1964.

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